



**COUNCILMEMBER DONNA FRYE**  
**City of San Diego**  
**Sixth District**

**MEMORANDUM**

**DATE:** February 20, 2007  
**TO:** City Attorney Michael Aguirre  
**FROM:** Councilmember Donna Frye *Donna Frye*  
**SUBJECT:** Land Development Code Revisions: Density Bonus Regulations

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The City of San Diego's Land Use and Economic Development and City Planning and Community Investment Department are proposing that the City Council adopt amendments to the Land Development Code and Local Coastal program that would:

- a.) Grant density bonuses and development incentives to comply with State law,
- b.) Grant two additional City- initiated amendments.

Due to the complexity of the proposed regulations, it is not clear to members of the public how these regulations will affect their communities. Issues include, but are not limited to, the city's ability to regulate growth and development in a manner that is consistent with the General Plan and Community Plans, and the level of public participation allowed in that process.

To the extent that certain decisions are considered ministerial, it appears that the public and the elected decision-makers have been eliminated from the process. The public may be denied an opportunity to participate in decisions where there will be significant negative environmental impacts to their community.

This is contrary to good public policy, and requires a more thoughtful approach than that which is being proposed.

I am providing some observations about the use of a Supplement to an EIR for the Land Development Code Revisions for the density bonus regulations. These observations are followed by a series of questions that I believe must be resolved before the city council takes any action on this issue. I have also provided some proposed solutions.

## **Supplement to an Environmental Impact Report**

The City of San Diego's Development Services Department prepared and circulated in July 2006, a Supplement to an Environmental Impact Report (EIR) (No. 96-0333, dated April 1997). The Supplement analyzes the Land Development Code and Local Coastal Program Revisions for the Affordable Housing Density Bonus Regulations, and was updated in September 2006, November 2006, December 2006 and February 2007.

According to the Distribution List, copies of the Supplement were not distributed to some organizations/groups/ agencies such as the Sierra Club, Tecolote Canyon Citizen's Advisory Group, Mission Trails Regional Park, U.S EPA, U.S. Fish and Wildlife Services or the Regional Water Quality Control Board. They received a Public Notice Only.

**The new density bonus regulations will have one or more significant effects not discussed in the previous 1997 EIR.**

The 1997 EIR (No. 96-0333) addressed the proposed revisions to the Land Development Code. However, the EIR **did not** analyze changes:

- in development or growth patterns,
- in density or type of allowable residential development,
- to the General Plan or community plans that would amend the type, location or density of development in the city.

The EIR also concluded that:

- There would be no significant impacts to neighborhood character.
- The project would not have a significant adverse effect on projected traffic volumes or on the ability of the existing circulation system to function as planned.
- There would be no changes to public access to beaches, parks or other open space.

The 1997 EIR also found the following mandatory areas of discussion **not** to be significant and therefore never discussed in any detail:

- Utilities
- Energy
- Recreational Resources
- Population
- Geology
- Noise
- Public Services (police, fire, libraries)

The Supplement provided no analysis of cumulative impacts to Neighborhood Character that may result from approval of ministerial projects.

In addition, the Supplement states that:

*“In general, the City’s community plans incorporate elements that specify or plan for adequate public services and facilities to accommodate the specific densities within each community. However, the proposed ordinance revisions would allow individual project densities over and above the current zoning and community plans and may allow the reduction or waiver of facilities benefit or impact fees as an additional development incentive. Therefore, it is possible that the adoption of the proposed ordinance could exacerbate current or future public service deficiencies. However, any proposed additional development incentives or concessions (deviations) would not be granted if they could result in a threat to public health and safety. This provision is a necessary finding for denying the development incentive (deviation). ”* (Emphasis added)

There was no discussion, analysis or proposed mitigation of this impact in the EIR and the above paragraph is the extent of the analysis in the Supplement. There was no analysis of significant effects that may result from the proposed ordinance on future public service deficiencies such as police, fire, libraries, and parks.

**There is a substantial increase in the severity of previously identified significant effects not discussed in the Supplement.**

The density bonus regulations could induce growth in excess of that anticipated in the General Plan and the community plans, yet there is no analysis of this in the Supplement.

Growth inducements could have a negative impact on water quality/hydrology, for example. The 1997 EIR did not provide any analysis of hydrology/water quality, because the proposed project did not involve changes in development or growth patterns. The Supplement provided no analysis of water quality/hydrology.

Neither the 1997 EIR nor the Supplement analyzed whether there would be an increase in the consumption of electric/natural gas utilities or a decrease in utilities conservation even though the Supplement recognizes that the proposed ordinance revisions would allow individual project densities over and above the current zoning and community plans.

The Supplement did not analyze the consistency of the project with the environmental goals of the General Plan and community plans citywide.

**The Supplement did not provide a reasonable range of potentially feasible alternatives that would avoid or substantially lessen any of the significant effects caused from adoption of the State density bonus regulations.**

The only alternative provided in the Supplement to avoid the environmental impacts associated with the adoption of the State density bonus regulations was to ignore State law! This is not a feasible alternative and it is unreasonable to have included it as the environmentally preferred alternative.

There does not appear to be any attempt to identify a reasonable range of alternatives that could feasibly accomplish the basic objectives of the project and avoid or substantially lessen at least some of the significant effects such as:

- amending the language in the density bonus ordinance that could reduce impacts but still comply with State law;
- consulting with other cities to see how they are complying and/or analyzing the potential negative environmental impacts; and/or
- working with our State legislators to seek amendments to the new law or, at a minimum, request an extension of time so that an adequate environmental analysis can be prepared.

### **Questions Regarding the Supplement to an EIR and the Proposed Ordinance**

There are numerous questions regarding the proposed ordinance and the Supplement to an EIR that must be resolved before this ordinance is heard by the city council. These questions include the following:

1. What changes can be made to the density bonus ordinance to address the significant environmental impacts and allow public participation while still complying with State law?
2. Does State law require the City to offer a waiver of Developer Impact Fees as an incentive?
3. Does State law require the City to offer waivers of building permit fees or any other fees that are normally collected?
4. Does State law require the City to provide incentives that would waive any requirements in the Building Codes or landscaping requirements (water conservation)?
5. How would the density bonus regulations impact land zoned for agricultural use? Industrial Use? Single-family Residential Use? Open space?

6. Can an applicant request and receive a deviation from a setback established at an intersection or driveway to provide visibility?
7. In a mixed -use project, can deviations be granted ministerially for the commercial development, including hours of operation and permitted noise levels?
8. Is there any limit on the extent of the deviation being requested? For example, in an area with a height limit, would the applicant be allowed to go even higher that would be necessary to achieve the density bonus?
9. If zero side yard or rear yard setbacks would be permitted, what impact would that have on light and air for adjoining properties?
10. New information of substantial importance shows that the project will have significant effects not discussed in the previous EIR. For example, there was no analysis of the increase in density over and above what is identified in the General Plan and community plans resulting in impacts to public health and safety, parks, transit, traffic and parking. Is the Supplement legally adequate or should a Subsequent EIR be prepared and circulated?
11. The Supplement states that, "*Ministerial projects are not subject to CEQA, and such projects would not undergo environmental review or be required to provide mitigation.*" Can the City, as the lead agency be required to provide a cumulative impacts analysis of the effects that may result from incentives being granted ministerially?
12. CEQA requires that where a project involves an approval that contains elements of both a ministerial action and a discretionary action, it will be subject to the requirements of CEQA as decided in *Day v. City of Glendale*. Also in *Friends of Westwood, Inc v. Los Angeles* 191 Cal. App. 3d 259, it held that the legislative history of CEQA indicates that the term '*Ministerial*' is limited to those approvals which can be legally compelled without substantial modification or change. However, the density bonus regulations seem contrary to this requirement. Please explain this apparent inconsistency.
13. What section of State law specifically requires a ministerial approval for density bonus?
14. Please clarify the following:

**§142.0725 Density Bonus Provisions**

A residential development proposal to utilize density bonus, in and (of?) itself, shall be processed in accordance with Process One.

Does this mean that the entire project must be processed as a Process One even though the project otherwise would require a discretionary permit?

If it is the determination of the City Attorney that only the utilization of the density bonus is ministerial but that other aspects of the project require discretionary approval, it is my understanding that CEQA review must address the entire project, including any ministerial action (State CEQA Guidelines §15268(d)). Please validate or correct my understanding.

15. §143.0740(a)(1)(A) would allow “a deviation to a development regulation.” Exactly what is a “development regulation”? It is imperative that the City Council, the public, and applicants have a clear and common understanding of all development regulations from which a project could deviate. In addition, there are numerous adopted manuals/guidelines, which although are not part of the Municipal Code, provide design criteria and standards for development, such as the Mission Trails Design Guidelines and the Old San Diego Architectural and Site Design Guidelines. Are these manuals/guidelines considered regulations? If so, can deviations be requested from the provisions of these manuals/guidelines? If so, please identify these manuals/guidelines and incorporate into the ordinance.
16. In District 6, there are areas in Clairemont and Linda Vista that are subject to the Community Plan Implementation Overlay Zone (CPIOZ). A Site Development Permit (Process 3) is required in Clairemont and may be in Linda Vista pursuant to Chap13Art2Div14. Would an applicant applying for a density bonus within the areas shown on Diagrams 132-13A and 132-14C still be required to obtain a Site Development Permit?  
  
What about the CPIOZ in other communities of Midway-Pacific Highway Corridor, Navajo, Pacific Beach, Peninsula, Rancho Bernardo, Rancho Peñasquitos, University, and Uptown?
17. The community of Clairemont Mesa is subject to a 30/40-foot height limit pursuant to MC Chap13Art2Div13. Exceptions can be considered with a Site Development Permit (Process 5) if certain findings can be made (§126.0504(j)). Does this mean that if an applicant chooses a height deviation he/she would not need to apply for a SDP and the City Council would not need to make the required findings?
18. Can an applicant request and receive a height or other deviation in the Lindbergh Field Airport Approach Overlay Zone? If so, shouldn't the Division of Aeronautics have received a copy of the EIR Supplement? And, if so, shouldn't the Supplement have addressed this potentially significant impact?
19. What about the Airport Overlay Zones for Montgomery Field and other airports?

20. In the Supplement, under Project Description, in the discussion on Proposition D, the 30-foot height limit in the Coastal Zone, it states that Prop D would not yield to the State law mandating density bonuses and incentives *“because the City is not seeking to amend the portion of the City’s Local Coastal Program pertaining to Proposition D.”* This language is not clear in its meaning. For example, wouldn’t a change to the City Charter to amend any voter-approved provision (such as Prop D) require a vote of the public?

### **Solutions**

1. Prepare a Subsequent Environmental Impact Report.
2. Provide simplified language and examples so that the regulations are easier to understand and implement.
3. Provide a map for each Community Plan that shows where the density bonus regulations apply. This map should include all the areas where the increased density could be higher than allowed by the underlying zone, Community Plan and/or Planned District Ordinance.
4. Provide a list of all incentives/ deviations that could be requested and received to facilitate an adequate analysis in the Subsequent EIR.
5. Provide a comprehensive list of all actions that are considered ministerial to facilitate an adequate analysis in the Subsequent EIR.
6. Identify, describe and cite the Municipal Code Section of all applicable development regulations and incorporate into the ordinance. (See question #15 for reference.)

Cc: Mayor Jerry Sanders  
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